

No. 79-823

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

BRUCE HANSON, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**MEMORANDUM FOR THE
FEDERAL RESPONDENTS IN OPPOSITION**

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Petitioner seeks review of the decision of the court of appeals in this internal revenue summons enforcement case dismissing his appeal as moot.

The pertinent facts are as follows: Special Agent Robert D. Manes of the Internal Revenue Service issued summonses to Irving Bank and Trust Co.; J.C. Penny Co., Inc.; Sears, Roebuck & Company of Dallas, Texas; Loeb, Rhoades, Hornblower & Co.; and Dallas Federal Savings and Loan, to produce rec-

ords pertaining to petitioner's business transactions during 1976 and 1977. Petitioner did not file federal income tax returns for those years. At petitioner's request, these firms refused to comply with the summonses (II-Tr. 9).¹

The United States and Special Agent Manes thereafter sought enforcement of the summonses in the United States District Court for the Northern District of Texas. Petitioner intervened in the proceeding pursuant to 26 U.S.C. 7609(b)(1). At the hearing held by the district court, petitioner sought to show by examination of Special Agent Manes (II-Tr. 19-24) that the Internal Revenue Service investigation was being conducted solely for a criminal purpose. With respect to the summons issued to the Irving Bank and Trust Co., petitioner argued that the Fourth and Fifth Amendments barred the Internal Revenue Service from obtaining documents relating to his business transactions (III-Tr. 20-22).²

Special Agent Manes testified that he had issued the summonses as part of an investigation to determine petitioner's correct tax liability (II-Tr. 9-11). He further testified that at the time the summonses were issued he had not decided whether to recommend criminal prosecution of petitioner and that the case had not been referred to the Department of Justice for criminal prosecution (II-Tr. 11-12).

¹ "II-Tr." refers to the transcript of the enforcement proceedings held in the district court on March 21, 1979.

² "III-Tr." refers to the transcript of the enforcement proceedings held in the district court on March 27, 1979.

At the conclusion of the enforcement hearing, the district court ordered the summonses enforced (III-Tr. 23). The court found that the investigation was not being conducted solely for a criminal purpose and rejected petitioner's constitutional objections to production of the records sought from the Irving Bank and Trust Co. (III-Tr. 22-23).

Petitioner thereafter filed a notice of appeal and a motion to stay execution of the enforcement order. The district court denied petitioner's motion for a stay. Petitioner then filed a motion for a stay of execution in the court of appeals, which was denied on April 16, 1979 (Pet. App. E). This Court denied petitioner's motion for a stay pending appeal on April 26, 1979 (Pet. App. F). The summoned parties thereafter complied with the summonses. On the government's motion, the court of appeals dismissed petitioner's appeal as moot (Pet. App. A).

1. The court of appeals correctly held that petitioner's appeal became moot once the parties complied with the summonses at issue. A case is moot when there is nothing further for the court to act upon, when the controversy has ceased to exist, and when it is impossible for the court to grant effective relief. See, e.g., *St. Pierre v. United States*, 319 U.S. 41 (1943); *Atherton Mills v. Johnston*, 259 U.S. 13, 15 (1922); see also 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3533, at 264-266 (1975). Here, once the summoned parties complied with the summonses, the controversy between the parties was at an end and it was impossi-

ble for the court to grant effective relief with respect to the question whether the Internal Revenue Service should have been allowed to examine the records.

In holding that the case is moot, the decision below is in accord with prior decisions of the court below and with the decisions of four other circuits. *E.g.*, *Barney v. United States*, 568 F.2d 116 (8th Cir. 1978); *Kurshan v. Riley*, 484 F.2d 952, 953 (4th Cir. 1973); *United States v. Lyons*, 442 F.2d 1144 (1st Cir. 1971); *Baldrige v. United States*, 406 F.2d 526 (5th Cir. 1969); see *SEC v. Laird*, 598 F.2d 1162 (9th Cir. 1979).

Contrary to petitioner's argument (Pet. 7-8), the enforcement order issued by the district court does not preclude him from challenging the introduction into evidence of the summoned material in a later civil or criminal proceeding. Because the production of the summoned material by the third parties caused this case to become moot, petitioner is free to raise any defenses he may have to its use as evidence in any subsequent proceeding against him. *Donaldson v. United States*, 400 U.S. 517, 531 (1971); *United States v. Blue*, 384 U.S. 251 (1966); *Sanford v. United States*, 358 F.2d 685 (5th Cir. 1966).

2. Petitioner further argues (Pet. 5) that the court of appeals' dismissal of his appeal as moot conflicts with *United States v. Friedman*, 532 F.2d 928, 931 (3d Cir. 1976). See also *United States v. Waltman*, 525 F.2d 371, 373 n.1 (3d Cir. 1975). In *Friedman*, *supra*, the court ruled that an appeal of

an order enforcing an internal revenue summons did not become moot on account of compliance by the summoned party. In that case, however, "there ha[d] been incomplete compliance with the court's order since the IRS ha[d] not yet taken [the] testimony [of one of the summoned parties]" (532 F.2d at 931). Moreover, the court premised its decision in part on the view that a holding in the summons enforcement proceeding could affect the possible use of the material in any subsequent criminal or civil proceeding. As we have pointed out (*supra* page 4), the enforcement of the summonses in this case would not prevent petitioner from challenging the introduction of the summoned material in a subsequent proceeding against him.

3. Finally, petitioner contends (Pet. 5) that the courts below erred in denying his motion for a stay pending appeal. But petitioner did not meet his burden of showing that the facts of this case warranted a stay. An applicant for a stay must show (1) a likelihood that he will prevail upon appeal; (2) irreparable injury unless the stay is granted; (3) no substantial harm to other interested persons; and (4) no harm to the public interest. *O'Brien v. Brown*, 409 U.S. 1, 3 (1972); *In re Grand Jury*, 583 F.2d 128 (5th Cir. 1978); *Martinez Rodriguez v. Jimenez*, 537 F.2d 1, 2 (1st Cir. 1976); *Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970); *Pitcher v. Laird*, 415 F.2d 743 (5th Cir. 1969); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C.

Cir. 1958) ; see *Coleman v. Paccar Inc.*, 424 U.S. 1301 (1976) (Rehnquist, J., in chambers).

Petitioner does not assert that there is a likelihood that he will prevail on the merits on appeal or that a stay of enforcement will not harm the public interest. Rather, his only argument (Pet. 7) is that he will suffer irreparable injury unless relief is granted because compliance renders his case moot, and, thus, deprives him of an effective appeal from his challenge to the legality of the summonses. That argument would justify the enforcement of all summonses and subpoenas until their validity is determined on appeal, with resulting unwarranted disruption of the enforcement of the tax laws and other aspects of the administration of justice. It is, instead, proper to remit petitioner to the raising of any defenses he may have to the evidentiary use of the summoned material in any subsequent proceeding against him that may arise.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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